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Supreme Court of the United States

OCTOBER TERM, 1968

No. 360

J. STERLING HALSTEAD, *Petitioner,*

v.

REFINED SYRUPS & SUGARS, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, J. Sterling Halstead respectfully prays that a *Writ of Certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming an order of the United States District Court for the District of Columbia granting Respondent's Motion for Summary Judgment dated June 13, 1967.

1. Neither the Opinion nor the Judgment in said proceeding has been printed.

2. The *Judgment of the Court of Appeals* was dated April 2, 1968.

3. A *Motion for Rehearing* was denied May 3, 1968.

4. The statutory provision believed to confer jurisdiction on this Court for the issuance of the writ in this proceeding is *Title 28 Sec. 1254 (1) U.S. Code.*

The Grounds Urged for the Issuance of the Writ

(a) The Court decided an important question of state law (N.Y.) in a way in conflict with the state and the general law on the question, and

(b) Failed to follow Rule 56(c) of the *Rules of Federal Practice,* in that it approved and affirmed the granting of a *Motion for Summary Judgment* by the *U.S. District Court,* in spite of the fact that there were "genuine issues as to material facts" shown in the record, which that *Court* proceeded to decide and to use as the basis on which to rest its opinion and decision.

The Question Presented

Whether a constructive trust should be imposed on the increase in value of 980 shares of *Corn Products Co.* stock retransferred to that corporation to fund a pension for Petitioner, a former employee of the transferror on the ground of unjust enrichment.

Statement of the Case

Petitioner was employed as counsel, General Counsel, Ass't Secretary, and Secretary of the Respondent and in the same capacities for its parent corporation, *Refined Syrups & Sugars Inc. (New York).* from 1942 to 1957, when *Corn Products Refining Company* purchased all of the assets of the latter, including all the stock of Appellee. (J.A. 2-3)

Three years prior to said purchase by *Corn Products,* these *Refined Syrups Companies* sought to institute a

Retirement Plan (J.A. 3) for their officers and employees in which Appellant's name was included (J.A. 3) but *to avoid delay in making the Plan effective and generally applicable* incident to determining the portion of Petitioner's compensation includible under the Plan, *Petitioner withdrew his name, on the agreement that other appropriate provisions would be made for Petitioner's retirement.* (J.A. 3)

When the assets of *Refined Syrups & Sugars Inc. (N.Y.)* were transferred to *Corn Products* including all the stock of Respondent, all the officers and employees of both corporations, except the Chairman of the Board, one of the Vice Presidents and Petitioner, were included in the more liberal Pension Plan of *Corn Products.*

On July 15, 1957, Petitioner's resignation was requested (J.A. 4) and Petitioner thereupon presented his claim to *Refined Syrups & Sugars, Inc. (New York),* the name of which had been changed to *R.S. & S. Liquidating Corp.,* that that corporation provide him with appropriate retirement compensation in accordance with their said agreement.

After extended negotiations among *R.S. & S. Liquidating Corporation, Corn Products Refining Company,* the Respondent and the Petitioner, *pursuant to a contract dated September 15, 1958, to provide a fund for the payment of retirement compensation (J.A. 22) to the Petitioner, R.S. & S. Liquidating Corporation retransferred 980 shares of the capital stock of Corn Products Refining Company,* previously received from that corporation, to the latter corporation. (Subsequently, the Directors of said *Corn Products Refining Company* voted to split its stock two shares for one) On *October 1, 1958,* Respondent signed an agreement

with Petitioner, providing for the payment to Petitioner of $1,000 per month, for nine years, subject to certain conditions, restrictions and the stipulation that the Petitioner would perform certain services drawn after conferences with representatives of the U.S. Bureau of Internal Revenue held for the purpose of making payments pursuant to the terms of said document, deductible for Income Tax purposes by Defendant. (J.A. 4)

These negotiations are reflected in the following excerpts from a letter dated February 13, 1958 (J.A. 45) addressed to Samuel A. McCain, the General Counsel for Corn Products Refining Company, now Corn Products Company, which inclosed early drafts of the 2 contracts. These together provided for the retransfer of the 980 shares of Corn Products stock described above in exchange for the agreement to pay Petitioner the pension of $1,000 monthly.

"February 13, 1958

* * * * * * * *

Dear Sam:

In accordance with your suggestion, I have made up, and enclose herewith, drafts of revised contracts covering the situation created by my claim against R. S. & S. Liquidating Corporation. Some provisions in these require explanation.

I have attempted to review thoroughly the decisions that might be relevant to this problem, with the following result:

The line of cases of which *Lucas* v. *Ox Fibre Brush Co.*, 281 U.S. 115, 8 AFTR 100901, P.H. 1958, par. 11 651, is the leading authority, indicate that a contract of this kind, based in part on past services and in part on services to be rendered, where no prior contract existed, is effective for tax

purposes and the payments under it deductible in the year when paid. See also, in this connection, *General Smelting Co.*, 4 T.C. 313; *Oppenheim, Inc.* v. *Cavanaugh*, 90 F.Supp. 107, 39 AFTR 468.

* * * * * *

I am not sure that I have caught your idea in the draft of the contract for R. S. & S. and Corn Products. In this I have merely set up the facts which seem to me relevant and necessary, and the action to be taken.

The contract for the Ohio corporation, however, has been changed somewhat.

You suggested in one of our phone discussions that the twelve-year certain payments in my original draft was not a desirable provision and that possibly payments for life would be better. The thought has occurred to me that you based this on the fact that reliance could not be placed on past services rendered to R. S. & S., or perhaps on the *Frook* case, *supra*. If this is in fact your basis, it will be taken care of by using services to the Ohio corporation. Moreover, Ed Freeman has shown not a little pique at the fact that superficially the payments I am asking are equal to his and I have no desire to antagonize him. I have accordingly changed the figure to thirteen years which, taking into consideration my age and Ed's, makes his contract and mine cover the same periods.

* * * * * *

It might facilitate matters if you would want to indicate the number of shares of stock you thought ought to be surrendered. Ed seems to be a bit slow about getting around to this.

With thanks for your patience and cooperation in trying to straighten out this situation,

Sincerely,

JSH:ML /s/ J. STERLING HALSTEAD"

* * * * * *

The quoted price of 980 shares of *Corn Products Refining Company* stock transferred to that corporation pursuant to the contract of September 15, 1958 with *Refined Syrups & Sugars Inc.*, at the closing of The New York Stock Exchange on that date was $46. per share, a total of $5,020. (J.A. 5)

In February 1967, Respondent advised Petitioner that neither *Corn Products* nor the Respondent, would make any pension payments to Petitioner after the last monthly payment provided in the contract dated October 1, 1958. The quoted market price of this stock of *Corn Products* on March 31, 1967, increased by a stock split up to 1960 shares, at $49½ per share, was $96,530, an increase of $51,510. (J.A. 5)

The payments made to Petitioner after adjustment for dividends and tax benefits accruing therefrom, total less than half said market value of 1960 shares of said *Corn Products Company* stock on March 1, 1967, and *unless Respondent is required to continue making pension payments to the Petitioner, said Respondent and its parent corporation or the stockholders of the latter, Corn Products Company will have been unjustly enriched to the extent of the difference between the total of said payments, after said adjustment and the said value of 1960 shares of said Corn Products Company stock on said date.*

Petitioner sued in Equity in the *United States District Court for the District of Columbia,* **to recover the 100 per cent increase in the value of the 980 shares** of the *Corn Products Company,* **so retransferred** by Petitioner's former employer to said *Corn Products Company* to provide a fund out of which to pay Petitioner a pension, **on the ground that it constituted**

unjust enrichment as to which Petitioner was entitled to relief in *Equity,* praying:

1. That Petitioner be decreed to be the owner in Equity of the balance of the fund derived from the 980 shares *of Corn Products stock* retransferred to Corn Products, after the deduction therefrom of the payments hertofore made to Petitioner.

2. That it be decreed that Respondent pay said difference to Petitioner or that it pay $1,000 per month to Petitioner until said balance is exhausted, and

3. That the Court grant such other and further relief as the Court should deem necessary or proper.

Respondent moved for Summary Judgment and to Dismiss Petitioner's Complaint.

Respondent's defense was rested on the following contentions:

1. Petitioner is suing at law to enforce a contractual obligation.

2. That there was no relation between the contract dated September 15, 1958 between Corn Products and *R.S. & S. Liquidating Corp.* and the contract of October 1, 1958 between Petitioner and Respondent.

3. That the purpose of the retransfer of the 980 shares of Corn Products stock to the latter corporation was not to provide a fund out of which to pay Petitioner's pension.

4. That the October 1, contract was solely to settle a claim for indemnity arising out of the pur-

chase by Corn Products of the assets of R.S. & S. Liquidating Corp.

The District Court, without Opinion granted Summary Judgment to Respondent.

Petitioner thereupon appealed to the United States Court of Appeals for the District of Columbia Circuit.

The Court of Appeals affirmed the Decision of the District Court.

ARGUMENT

In its opinion the Court of Appeals rests its conclusions and decision on alleged grounds involving "genuine issues as material facts".

The first of these is: that Petitioner is suing to impress a trust on **the 980 (now 1960) shares of Corn Products stock** received pursuant to 2 contracts, dated respectively September 15, 1958 and October 1, 1958.

Actually the record in this proceeding shows Petitioner's suit is for the **increase** in value accrued on that stock representing the unconscionable profit resulting from the contracts which were entered into to provide a pension for petitioner.

The Second is that the contract of September 15, 1958 under which the 980 shares of Corn Products stock was retransferred to *Corn Products* was not, the Court concludes, made for the purpose of providing a pension fund for Petitioner but solely for the purpose of indemnity.

The inference from the Court's opinion is that the corporate separation of *Corn Products* and its wholly owned subsidiary, the Respondent, precludes even a Court of Equity from requiring Respondent to dis-

gorge the unconscionable profit, realized by these corporations, **even though the record is clear that both the parent and subsidiary were parties to the general agreement made up of said contracts of Sept. 15th and Oct. 1, 1958.**

Third that Petitioner is barred from recovery in this suit, even in a Court of Equity, because he has not joined *Corn Products* as a defendant, when the record shows clearly that these 980 shares of Corn Products stock were retransferred to *Corn Products* so that Respondent would pay Petitioner's pension and Respondent has confirmed this *by actually paying the pension for 9 years and taking advantage of Petitioner's services and experience at Respondent's election* as required in Petitioner's pension contract.

The Court of Appeals also rested its opinion on a conclusion as to another question of disputed fact and law: that Petitioner's claim is barred by the Statute of Limitation and laches, both controverted by Petitioner in his Statement in Opposition * * * to the Motion for Summary Judgment (J.A. 25-26), *citing Peters v. Sutter,* 2 MacArthur (D.C. Reports Sept. 1876) and *Halliday v. Halliday,* 56 Appeals D.C. 179, 1926.

In reaching these conclusions and basing its decision on them, the Court of Appeals was deciding "genuine issues as to material facts" which should have precluded the granting of the Motion for Summary Judgment by the District Court and clearly constituted prejudicial error on the part of the Court of Appeals.

All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for Summary Judgment.

Zig Zag Spring Co. v. *Comfort Spring Corp.*, 89 F. Supp. 410 (D.C. N.J. 1950).

> "Summary judgment may not be given under Rule 56 of the *Rules of Civil Practice* if there is an issue presented as to the existence of any material fact . . . "

Merchant Indemnity Co. v. *Peterson*, 113 F. 2d 4, 6 (2nd Cir.).

> "Upon a motion for Summary Judgment, it is no part of the Court's function to decide the issue of fact but solely to determine whether there is an issue of fact to be tried."

Todelman v. *Missouri Kansas Pipe Line*, 130 F. 2d 1063 (3d. Cir.).

To the same general effect:

Ramsouer v. *Midland Valley Co.*, 44 F. Supp. 523 (D.C. Ark. 1942).

Sarnoff v. *Ciaglia*, 165 F. 2d 167 (3d. Cir.).

Also *Harris* v. *Tobriner*, 113 U.S. App. D.C. 10, 304 F. 2d 377 (1962).

CLEARLY THIS IS A CASE OF UNJUST ENRICHMENT REQUIRING THE IMPOSITION OF A CONSTRUCTIVE TRUST.

The following decisions and text authorities show some situations where Courts of Equity have found it necessary to disregard or supplement the provisions of express contracts and impose a constructive trust to accomplish justice and prevent unjust enrichment.

89 Corpus Juris Secundum, page 1027

> "Generally, any transaction may be the basis for creating a constructive trust where for any reason

> defendant holds funds which in Equity and good conscience should be possessed by the plaintiff. The forms and varieties of constructive trusts are practically without limit, . . . such trusts being raised, broadly speaking, whenever necessary to prevent injustice . . . " *Amherst College* v. *Ritch,* 151 N.Y. 283.

Beatty v. *Guggenheim Exploration Co.,* 225 N.Y. 180, 122 N.E. 172 (Jan. 1919). Here the employee in his contract of employment, agreed not to accept employment and not to become interested directly or indirectly in any competing business. Only the breach of the latter promise was in issue in the case.

The court held a constructive trust should be imposed, for the benefit of his employer, on the profits from a contract of the defendant with such a competing business. In his opinion, Judge Cardozo said:

> "We think therefore, that aside from the special provisions of the contract the agent became a trustee at the election of the principal . . . A constructive trust is a formula through which, the conscience of Equity finds expression when property has been acquired under circumstances that the holder of the legal title may not in good conscience retain the legal title. Equity converts him into a trustee . . . "

Herrman v. *Gleason,* 126 F. 2d 936-940, is an authority for the same equitable principle and lists the leading authorities supporting it.

> "Under the doctrine of unjust enrichment a defendant has something of value at Appellant's expense under circumstances which impose a legal duty of restitution." *American University* v. *Forbes,* 88 N.H. 17, 183 Atl. 860. See *Wilson Cyprus* v. *Atlantic Coastline R. Co.* (5th Cir., 109

F.2d 623). Ames *Lectures On Legal History,* pp. 149-166. Holdsworth's *History of English Law,* Vol. VIII, P. 92 et seq., Lawrence *Equity Jurisprudence,* Par. 738

"A person is enriched if he has received benefit and when he has been unjustly enriched at the expense of another is required to make restitution." See *Restatement of the Law.* 1 Restitution.

Grand Trunk, etc. Rwy. v. *Chicago, Indiana etc. Rwy.,* 131 F. 2d 215, (CCA 7, (1942)). In this case one of five contestants of railroad properties brought suit to recover overpayments of rental made through a mistake in the construction of the lease and after recovering was sued by one of the other co-tenants. The Court said at page 217:

"There being nothing due it, defendant railroad must have brought its suit for and recovered for plaintiff and the other lesses who had paid more than their shares. It recovered money as a trustee of the plaintiff. The money which it recovered did not belong to it but constituted a trust fund which it held for those lessees who had overpaid their share of rental."

The facts of Petitioner's case, on which he bases his suit, and the applicable law, also sustain it and justify the relief prayed, on the law of New York as to "3rd party beneficiary contracts" in that state, since the contract of September 15, 1967 between *Corn Products* and R.S.&S. Liquidating Corporation, a New York corporation, it was made in New York for the benefit of *Petitioner;* then as a resident of New York. See *Contracts for the Benefit of a Third Party,* Abbott, *New York Digest,* Vol. 8, section 187(1) and (2). *Auervach* v. *Grand Nat. Pictures,* 29 N.Y.S.2d 747.

The fact that framing the contract for retransfer of the 980 shares of Corn Products stock to *Corn Products* under the indemnity provision of an existing contract was advantageous to *the* Respondent and *Corn Products* from the standpoint of Federal Income Taxes, should not preclud a Court of Equity from granting relief to prevent Respondent and *Corn Products* from retaining a profit of more than $50,000 on their contract to pay Petitioner a pension, which *Corn Products* and Respondent, as purchasers of the Refined Syrups business, should have paid without funding and to which they have not contributed a dollar.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

[Not to be printed or submitted to West for publication]

(Filed Apr 2 1968)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,160

J. STERLING HALSTEAD, *Appellant*

v.

REFINED SYRUPS AND SUGAR, INC., *Appellee*

Appeal from the United States District Court for the District of Columbia

Decided April 2, 1968

MR. J. STERLING HALSTEAD, appellant pro se.

MR. PAUL H. MANNES, with whom MR. SHELDON E. BERNSTEIN was on the brief, for appellee.

Before DANAHER, TAMM and LEVENTHAL, *Circuit Judges.*

Per Curiam: After consideration of the contentions urged by plaintiff-appellant, we affirm the summary judgment dismissing with prejudice the complaint to establish a constructive trust on certain property received by Corn Products Refining Co., and prevent unjust enrichment. On the undisputed facts defendant-appellee is entitled to judgment as a matter of law for any one of several alternative reasons:

(1) Plaintiff seeks to impose a constructive trust on property (980 shares of Corn Products stock) received

by Corn Products, yet he has sued as defendant not Corn Products, but only its subsidiary, an Ohio corporation.

(2) The complaint does not attack either (a) the October 1, 1958 agreement whereby plaintiff's claim against defendant's predecessor for a pension was settled through agreement for defendant to employ plaintiff at $12,000 a year for 9 years, or (b) the prior September 15, 1958 agreement whereby defendant's predecessor delivered the 980 shares to Corn Products as an indemnification (because of plaintiff's claim asserted against the company whose assets were transferred to Corn Products).

(3) Plaintiff received substantial payments under the October agreement and the parties have changed their position because of it. Defendant's predecessor (the New York corporation) had to make a payment in indemnification (of the 980 shares) which have since changed in value. If plaintiff had a claim it would be barred by the statute of limitations or laches.

(4) Insofar as plaintiff asserts a legal theory that he can sue as third party beneficiary of the September agreement, that agreement plainly shows on its face that it was in no way entered into for plaintiff's benefit. Plaintiff's claim presented a problem which the parties set about working out with each other, not for his benefit but for their own mutual objective.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth in Petitioner's Appendix 1a-2a. There was no opinion of the United States District Court for the District of Columbia.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether, within the contemplation of Supreme Court Rule 19, the United States Court of Appeals for the District of Columbia Circuit has decided an important State question in conflict with applicable State law or has sanctioned a departure by the United States District Court for the District of Columbia from the accepted and usual course of judicial proceedings requiring exercise of this Court's supervisory power.

2. Whether this cause of action attempting to establish a constructive trust, which is of interest only to the parties and involves only the evaluation of petitioner's complaint and other documents, the genuineness of which is admitted, is one of such significance or import as to require this Court's attention.

STATEMENT OF THE CASE

This is an action, filed in the United States District Court for the District of Columbia against an Ohio corporation qualified to do business in the District of Columbia, to establish a constructive trust and to prevent unjust enrichment. Upon full consideration of the pleadings, exhibits and answers to defendant's Requests for Admissions, the United States District Court for the District of Columbia granted respondent's Motion for Summary Judgment. (JA 2, 49). The United States Court of Appeals for the District of Columbia Circuit affirmed giving several alternative reasons therefor including, *inter alia,* that the claim was barred by the statute of limitations or laches and that

petitioner had no standing to sue as a third party beneficiary of an agreement of September 15, 1958, between Corn Products Refining Company, a New Jersey Corporation, (sometimes referred to hereinafter as "Corn Products") and R S & S Liquidating Corporation, formerly Refined Syrups & Sugars, Inc., a New York corporation (Petitioner's App. 1a-2a).

The undisputed facts supporting the summary judgment granted respondent are as follows: By virtue of an agreement dated January 21, 1957, between Corn Products Refining Company and Refined Syrups & Sugars, Inc. (New York),[1] Corn Products acquired all the assets of Refined Syrups & Sugars, Inc. (New York) the purchase price therefor being 128,288 shares of the common stock of Corn Products. One of the terms of acquisition was that Corn Products assumed certain specific liabilities and obligations of Refined Syrups & Sugars, Inc. (New York) and the Vendor agreed to indemnify and hold Corn Products harmless against all liabilities, obligations and claims not specified and so expressly assumed. (J.A. 15, 19, 40). Immediately following the acquisition, the Vendor changed its name to Refined Syrups & Sugars Liquidating Corporation. At the same time substantially all of the acquired assets and the assumed liabilities of the Vendor were passed by Corn Products to Refined Syrups & Sugars, Inc. (Ohio), the respondent herein, which by reason of having been a subsidiary of the Vendor had now become a subsidiary of Corn Products.

Petitioner, claiming to be an employee of respondent and of Refined Syrups & Sugars, Inc. (New York) at the time of the purchase and sale above detailed, filed

[1] Sometimes hereinafter referred to as "Vendor".

a claim on March 31, 1958, for retirement and severance benefits similar to those applicable to officers and employees. As this claim was not one of the liabilities or obligations assumed by Corn Products in the purchase agreement, it would, if required to be satisfied, have reduced the value of the assets acquired by Corn Products. Accordingly, the latter was entitled under the indemnity agreement to indemnification from the Vendor then named Refined Syrups & Sugars Liquidating Corporation, to the extent of the cost of satisfying petitioner's demand. (J.A. 4, 14, 19, 40).

As a result of negotiations in which petitioner participated, his claim was settled by an agreement dated October 1, 1958, between him and Refined Syrups & Sugars, Inc. (Ohio), respondent herein, then a Corn Products subsidiary (J.A. 16, 20). Under the terms of the agreement, petitioner was to serve as a consultant for a nine-year period receiving compensation at the rate of $12,000.00 per year or a total of $108,000.00. Prior to the execution of the foregoing consultant agreement, the Vendor then named Refined Syrups & Sugars Liquidating Corporation and Corn Products entered into an agreement of indemnification under date of September 15, 1958, by which the purchase price of the assets of the Vendor was adjusted by the return to Corn Products by the Vendor of 980 shares of Corn Products stock, part of the purchase price paid by Corn Products for Vendor's assets, because of the expense incurred in the settlement of petitioner's claim. (J.A. 14). After the lapse of nine years and his receipt of the full $108,000.00, petitioner filed suit claiming that Refined Syrups & Sugars, Inc. (Ohio) had been unjustly enriched because the market value of Corn Products stock had doubled in the intervening years.

ARGUMENT

I.

The Decision Below Is Clearly Correct; the Petitioner Has No Possible Cause of Action

In essence, petitioner's claim is that the decision below is wrong and resolves a question of New York law in conflict with the applicable state and general law. Respondent submits that the courts below were correct for any one of a number of reasons; summary judgment was properly entered either on the basis that under the undisputed facts, many of which are set out in the complaint, plaintiff's claim was barred either by the statute of limitations or laches, or by an accord and satisfaction or on the basis that no benefit was intended to be conferred upon respondent either for or by petitioner.

It has been stated that "the doctrine of unjust enrichment is equitable in its nature, and generally it is applied to permit a recovery where one person has received a benefit from another and the retention thereof would be unjust under some legal principle recognized in equity." *Rhode Island Hospital Trust Co.* v. *The Rhode Island Covering Co., Inc.*, 190 A.2d 219, 220-221 (R.I. 1963). Petitioner's claim must presuppose that the respondent received a benefit from him which would be inequitable for it to retain. *Herrmann* v. *Gleason*, 126 F.2d 936, 940 (6th Cir. 1942). In this case, respondent received no benefit which it should disgorge. It had incurred a substantial liability in the form of petitioner's claim for which its parent, Corn Products Refining Company, did not bargain and in connection with the settlement of which it was entitled to indemnity. Thereafter Corn Products made its claim for indemnification which was resolved by an agreement

with the Vendor. The indemnification need not have been in the form that it was, that is, 980 shares of Corn Products stock valued (at the time of its return) at approximately $45,080.00, and that stock might for all anyone knows at this time, have been sold immediately thereafter. It is beyond contradiction that had the price of Corn Products stock declined in the period following April 1, 1958, the respondent could not have escaped its obligation to pay petitioner $108,000.00. In other words the obligations of the parties were in no manner tied to the vagaries of the stock market. Indeed these payments to petitioner were to continue even after his death.

The authorities relied upon by the petitioner both in this Court and below offer no support to his position that he has stated a cause of action. Clearly, there was no intention to create a right in petitioner by the contract of September 15, 1958, whereby the purchase price paid by Corn Products for the assets of the Vendor was to be adjusted; to the contrary, this contract was solely for the benefit of Corn Products under its contractual right of indemnification in order to make an adjustment of the purchase price occasioned by petitioner's claim. Even if the contract of indemnification and the contract hiring the petitioner as a consultant were construed as a single agreement, petitioner's complaint still does not state a cause of action as the respondent did everything it was obligated to do, to wit, to pay the petitioner $108,000.00, the last payment having been made on March 1, 1967, two days before the action was filed.

Auerbach v. *Grand Nat. Pictures, Limited,* 29 N.Y.S. 2d 747 (Sup. Ct. 1941), cited by petitioner, merely re-

peats the unquestioned, that *Lawrence* v. *Fox* is still the law of New York and that unless established to the contrary New York courts will presume that it is the law of all common law jurisdictions. In *Beatty* v. *Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378 (1919), Mr. Justice Cardozo then speaking for the Court of Appeals stated that an agent's employer could orally waive a contract condition that the agent could not be interested in a similar business even though the employment contract provided that the contract could not be altered except by writing subscribed by the parties. What comfort this decision and *Grand Trunk Western R. Co.* v. *Chicago & Western Indiana R. Co.*, 131 F.2d 215 (7th Cir. 1942) offer petitioner is still obscure.

Petitioner's charge that respondent has been "unjustly enriched" merely questions the adequacy of consideration. However, throughout his brief petitioner ignores that even in the extraordinary case when fairness and adequacy of consideration are truly in issue these must be evaluated as of the time of the making of the contract; "... as to the time of the inadequacy, in order that it may ever be fatal, it must exist at the concluding of the contract. If there was no inadequacy at the making of the contract, none can arise from subsequent events or change of circumstances." *Pomeroy's Equity Jurisprudence*, 5th Ed. § 927, p. 638 (1941). See *In re Stevens' Estate*, 163 C.A. 2d 255, 329 P. 2d 337, 342, (2d Dist. App. Cal. 1958); *Pearson* v. *George*, 209 Ga. 938, 77 S.E. 2d 1, 6 (1953); *Dingler* v. *Ritzius*, 42 Idaho 614. 247 P. 10, 11 (1926).

Neither law nor equity supports petitioner. The undisputed facts are that the parties to the settlement of

petitioner's claim and the parties to the indemnification agreement received precisely what they had openly, informedly and fairly bargained for.

II.

There Are No Special and Important Reasons for Granting the Writ of Certiorari

Understandably, petitioner is unhappy with the result below. But his dissatisfaction does not lay a basis for exercise of this Court's jurisdiction even assuming, contrary to fact, that there was error below. The subject of the petition involves a matter of importance only to the particular litigants; it contains not an iota of general or national significance or interest.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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